

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DATHAN BEAN,

Plaintiff,

v.

SANDRA HAUTAMAKI, JEFFREY P.
ENDICOTT and KELLY MUESKE,

Defendants.

ORDER

04-C-447-C

Plaintiff Dathan Bean contends that his Eighth Amendment rights were violated when defendants, administrators of the Red Granite Correctional Institution, ignored his repeated requests for separation from inmate Oscar McMillian. Plaintiff alleges he was terrorized by McMillian during the time he and McMillian shared a prison cell. Trial is set for September 6, 2005.

Defendants have filed a motion in limine asking the court to qualify the “affidavits” of Red Granite Correctional Institution Psychological Services Supervisor Barbara Seldin and nurse Sharon Salter as admissible hearsay exceptions under Federal Rule of Evidence 803(10) or under Rule 807, the residual hearsay exception. Defendants wish to offer the

documents at trial to prove that there are no medical records indicating plaintiff requested treatment in the prison's health or psychological service units from April 24, 2004 to July 7, 2004, part of the period during which he was double-celled with Oscar McMillian.

Rule 803(10) is an exception to the hearsay rule that permits admission of evidence showing the absence of a public record or entry. The non-existence of a record can be shown in either of two ways: (1) through testimony or (2) through a self-authenticating certificate. Regardless of the method chosen, Rule 803(10) requires a declarant to allege that records of the type sought were regularly made and preserved by a public office or agency and that a diligent search failed to disclose the records in question. In addition, to qualify for admissibility under Rule 803(10) the declarant's certificate must be self-authenticating under one of the provisions of Rule 902.

Defendants wish to offer the written statements (titled affidavits by defendants but better understood in the context of Rule 803(10) as certificates) of Sharon Salter and Barbara Seldin in lieu of Salter and Seldin's testimony in court. Seldin's statement indicates that she is a custodian of medical records maintained by the Red Granite Correctional Institution's Psychological Services Unit. She states that these medical records are maintained by the institution in its regular course of business. She states also that she has reviewed the Psychological Services Unit records and has not found any evidence that plaintiff (1) submitted requests to be seen by Psychological Services staff or (2) was seen by

psychological services staff from April 21, 2004 to July 6, 2004. Salter's statement makes the same assertions with regard to records of the Health Services Unit. Although Salter and Seldin do not state specifically that each custodian performed a diligent search, as required by Rule 803(10), it seems reasonable to infer diligence in this context.

To be admissible under Rule 803(10), certificates must be self-authenticating under Rule 902. Rule 902(11) provides that a record is self-authenticating if it "would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian" certifying that the record was made at or near the time of the occurrence of the matters set forth within the document by a person with knowledge of those matters; that the record was kept in the course of regularly conducted activity; and that the record was made as a regular practice.

When determining whether a certificate made under Rule 803(10) is self-authenticating, the relevant question is whether the records sought would have been self-authenticating under Rule 902(11) if they had been found by the custodian,. Here the answer is yes. Seldin and Salter's statements are therefore self-authenticating.

Rule 902 requires also that adverse parties be given notice of the moving party's intention to enter a self-authenticating document into evidence. Under the rule, the moving party must make records available for inspection and provide the adverse party with a fair opportunity to review the records in question.

In this case, the filing of defendant's motion in limine has provided plaintiff with the notice required under Rule 902. In the event that plaintiff wishes to challenge the accuracy of Seldin and Slater's certifications, he will have the opportunity to do so at trial.

In their certifications, Seldin and Salter state that they are custodians of the Red Granite Correctional Institution's medical records, and that these records are regularly maintained as a part of the health units' regular course of business. Had Seldin and Salter located any of the records for which they searched, the records would have been admissible under Rule 803(6). Therefore, Salter and Seldin's statements that no such records were found are also self-authenticating under Rule 902(11). Since their statements meet all other requirements of Rule 803(10), they qualify as exceptions to the hearsay rule, barring any challenges by plaintiff to their fundamental accuracy.

Because I will permit the certificates of Salter and Seldin to qualify as hearsay exceptions under Rule 803(10), I need not address their admissibility under Rule 807.

ORDER

IT IS ORDERED that defendants' motion in limine is GRANTED. The statements of

Barbara Seldin and Sharon Salter will qualify as hearsay exceptions under Fed. R. Evid.
803(10).

Entered this 25th day of August, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge